

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   WASHINGTON STATE                   :

4   DEPARTMENT OF SOCIAL AND           :

5   HEALTH SERVICES, ET AL. ,           :

6                   Petitioners                   :

7           v.   :   No. 01- 1420

8   GUARDIANSHIP ESTATE OF           :

9   DANNY KEFFELER, ET AL.           :

10   - - - - -X

11   Washington, D. C.

12   Tuesday, December 3, 2002

13                   The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States at

15   11: 02 a. m

16   APPEARANCES:

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18           Washington; on behalf of the Petitioners.

19   PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor

20           General, Department of Justice, Washington, D. C. ; on

21           behalf of the United States, as amicus curiae,

22           supporting the Petitioners.

23   TERESA W. ROSEBOROUGH, ESQ., Atlanta, Georgia; on behalf

24           of the Respondents.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 JUSTICE STEVENS: We will hear argument in No.  
4 01-1420, Washington State Department of Social Services  
5 against the Guardianship Estate of Daniel Keffeler.

6 General -- is it Gregoire or Gregory?

7 ORAL ARGUMENT OF CHRISTINE O. GREGOIRE

8 ON BEHALF OF THE PETITIONERS

9 MS. GREGOIRE: Gregoire.

10 QUESTION: Gregoire. Thank you.

11 MS. GREGOIRE: Justice Stevens, and may it  
12 please the Court:

13 The question presented in this case is whether a  
14 representative payee, appointed by the commissioner of  
15 Social Security, violates the anti-alienation provision of  
16 42 U.S.C., section 407(a), when it uses Social Security  
17 benefits to pay for the beneficiary's current maintenance.

18 The plain text of section 407(a) answers this  
19 question, and the answer is no.

20 Section 407(a) provides that benefits are not  
21 subject to execution, levy, attachment, garnishment, or  
22 other legal process. The department here does not use  
23 compulsory legal process to obtain benefits. Instead, the  
24 department is appointed representative payee by the  
25 commissioner, pursuant to 42 U.S.C., section 405(j), and

1 as payee, the department is under the supervision of the  
2 commissioner and uses the benefits to pay for the current  
3 maintenance of the beneficiary in accordance with the  
4 Social Security regulations.

5 In short, when looking at the statutes as a  
6 whole, 407(a) does not prohibit that which is expressly  
7 authorized by 405(j). The purpose of 407(a) is to ensure  
8 that Social Security benefits are available to pay the  
9 beneficiary's current maintenance by preventing creditors  
10 from taking those benefits. Legal process, as referenced  
11 in 407(a), is the means by which a court, agency, or  
12 official authorized by -- by law compels compliance with  
13 its demands. It is compulsory legal process.

14 Here there is no legal process. The  
15 representative payee here stands in the shoes of the  
16 beneficiary, sharing in the cost of care, consistent with  
17 the Social Security regulations.

18 QUESTION: Can a set-off ever be legal process?  
19 Suppose there were a tax indebtedness by the beneficiary.  
20 Could the State just under -- assuming that its set-off  
21 principles allowed it, could the State simply take some of  
22 the beneficiary's money from the Social Security and set  
23 it off against the tax debt?

24 MS. GREGOIRE: If -- the violation of 407(a)  
25 comes in -- comes into play when there's a legal process

1 that actually attaches to those Social Security benefits.

2 QUESTION: So you would say there's no 407  
3 violation in that event.

4 MS. GREGOIRE: Correct.

5 QUESTION: Although I presume there would be a  
6 cause of action against the State for -- for not behaving  
7 properly as the -- what -- what is the -- the --

8 MS. GREGOIRE: Representative payee?

9 QUESTION: As the representative payee within  
10 that --

11 MS. GREGOIRE: I believe that's true, Justice  
12 Scalia. The questions that have been presented here by --  
13 by the respondents are 405(j) questions as to whether the  
14 representative payee acted accordingly within their  
15 purview. Here there is full compliance with the Social  
16 Security regulations. In this particular instance, the  
17 department is duly recognized as a representative payee  
18 subject to supervision, having to submit constant reports  
19 and annual reports and accounting system, and there are  
20 audits that have been performed on the department. It is  
21 acting in accordance with 405(j) as rep payee.

22 QUESTION: And why -- why is 405(j) not at issue  
23 here?

24 MS. GREGOIRE: Well --

25 QUESTION: Because those points are raised, of

1 course, in the -- in your opponent's brief.

2 MS. GREGOIRE: Yes, Your Honor, but if you -- if  
3 you look at the complaint in this particular case by -- by  
4 the respondent, if you look at the certification of the  
5 class that's present here, if you look at the holding  
6 below, in every instance the question presented is whether  
7 a representative payee duly appointed can use the benefits  
8 for the cost of care of the beneficiary. We think that  
9 plain text of 407(a) says the answer is there is no  
10 violation whatsoever.

11 QUESTION: General Gregoire, I'd like to just  
12 find out if -- let's say we accept your argument this is  
13 not a 407 case, and then the question is put, but there  
14 are alleged misappropriations here. For example, there's  
15 some suggestion of double dipping and there's some other  
16 things which may or may not be right. I don't know that  
17 there is such a thing as a right of any individual to go  
18 after the representative payee. I thought that was  
19 something within the Social Security regs. I thought I  
20 heard you say, oh, yes, but that's not a 407 claim. That  
21 would be a 405 claim. And I was not aware that there is  
22 such a thing apart from the administrative process. Is  
23 there some right to sue eventually in court under 405?

24 MS. GREGOIRE: What the Social Security Act  
25 provides is one of two things. It can be done by the

1 commissioner by the removal of the representative payee if  
2 they have violated. It can be done by a court. But the  
3 remedy, if -- even if done by a court, is back to the  
4 commissioner to remove the representative payee and  
5 appoint one that would act in -- in accordance with the  
6 regulations.

7 Here, while there are allegations --

8 QUESTION: And who -- who can invoke the court's  
9 assistance? The --

10 MS. GREGOIRE: An individual, the -- the  
11 beneficiary could.

12 QUESTION: The beneficiary can?

13 MS. GREGOIRE: Yes.

14 But here, all of those allegations, one, are not  
15 contained within the holding below, but most importantly,  
16 there is no record to find any violation of 405(j) in this  
17 case whatsoever. To the contrary. The department here  
18 has acted absolutely consistent with the Social --

19 QUESTION: May I ask you this question related  
20 to that? Do you agree with the position asserted in the  
21 dissent, with the State court?

22 MS. GREGOIRE: We -- we do not, Your Honor. We  
23 believe the -- the dissent is wrong on -- on two bases.  
24 One, the -- the court below suggested that there was some  
25 use of -- of benefits for past debt --

1 QUESTION: Right.

2 MS. GREGOIRE: -- when in fact there -- that is  
3 not the case here and there is no finding to that effect  
4 by the lower court.

5 QUESTION: No finding. Were there allegations  
6 to that effect?

7 MS. GREGOIRE: Only after the -- the remand and  
8 -- and the supplemental brief that was submitted in the  
9 State supreme court.

10 But there -- in this particular case, what  
11 happens, by way of clarification, is when the State of  
12 Washington gets a lump sum check for an individual whose  
13 SSI, Social Security Title XVI application has been  
14 pending, they will then use that check to pay current  
15 maintenance for those months for which the child was  
16 deemed eligible for SSI and was receiving foster care up  
17 to a maximum of 6 months. That is considered current  
18 maintenance, not past maintenance. We think the -- the  
19 concurring opinion was confused by that.

20 Secondly, the concurring opinion says, you --

21 QUESTION: Excuse me. Why -- why do you say it  
22 is considered current and not past? You -- you just  
23 decide 6 months is a reasonable currency criterion?

24 MS. GREGOIRE: No.

25 QUESTION: Or is it a regulation or what?



1                   MS. GREGOIRE: It is. It is, Your Honor.  
2 Justice Scalia, what the Social Security regulations put  
3 in place with respect to Title XVI benefits, SSI, that  
4 anything beyond 6 months by Social Security itself is put  
5 into an account and allowed to accumulate interest. It  
6 cannot be used for the current maintenance of the child.

7                   And the second basis -- Justice Stevens, the  
8 second basis that we think was wrong in -- in the  
9 concurring opinion is where she finds that you have to  
10 look at the extras for the child first, over and above  
11 current maintenance, and that we submit to you is in --  
12 contrary to the Federal regulations themselves, 20 C.F.R.  
13 404.2040, which expressly provides that you look first to  
14 the current maintenance. That's the very purpose behind  
15 both Title II and Title XVI, first to the current  
16 maintenance, and then you guess -- within the broad  
17 discretion accorded a representative payee, you may look  
18 to see if there are extras to which those monies could be  
19 spent.

20                  Here, the Department of Social and Health  
21 Services uses the benefits for both, and the record  
22 verifies that.

23                  But let me bring to the Court's attention what  
24 we're talking about here. We're talking about children  
25 who arrive in the State's custody through a juvenile court

1 proceeding, having been abandoned, abused, or neglected.  
2 They are subject to the jurisdiction of the juvenile  
3 court, and then those children are assessed by an  
4 individual service plan as to what their needs are. And  
5 what happens when that assessment takes place is their  
6 needs are being met by the department.

7 In fact, the average payment for foster care for  
8 a SSI child is \$1,776. The average amount that an SSI  
9 benefit would be is something short of \$500. And the base  
10 foster care amount is something short of \$500. The fact  
11 is the special needs of these children are being met so  
12 their lives can be turned around, they can go back out and  
13 be productive members of society --

14 QUESTION: Well, I -- I think we're all  
15 interested in the needs of the children.

16 In some cases, though, I take it that the --  
17 that the Social Security payments are being applied to  
18 reimburse the State for something the child would get for  
19 free anyway.

20 MS. GREGOIRE: We don't submit, Your Honor -- we  
21 think that's wrong. The fact that these children are --  
22 are getting foster care doesn't mean it's free. In fact,  
23 the expectation of both Social Security --

24 QUESTION: Well, I mean free in the sense that  
25 the State would pay for it anyway.

1 MS. GREGOIRE: Your Honor, there is an  
2 expectation in State law and an expectation in the Social  
3 Security Act that -- that what this money is to be used  
4 for is the current maintenance of the child. What would  
5 be the difference if we were to submit that it's free in  
6 the home of a parent? A parent surely -- and under  
7 Washington State law -- absolutely is obligated to pay for  
8 the child's care and maintenance. Are we then to suggest  
9 that anytime a child in the home of a parent gets SSA or  
10 SSI, it can't be used for current maintenance because the  
11 parent has to use their own funds for that purpose?

12 QUESTION: Well, but we're talking about the --  
13 the State has a certain -- has assumed a certain  
14 obligation and made certain payments. And in the event  
15 the representative payee is someone other than the State,  
16 the State is going to pay -- pay those benefits and -- and  
17 the SSI will be available for other purposes. So it's --  
18 it's not necessarily always in the best interest for the  
19 child.

20 MS. GREGOIRE: But, Justice Kennedy, that would  
21 be -- that would be the case with a parent. A parent is  
22 obligated to pay for the current maintenance of the child.  
23 Does that mean they can never use their SSA or SSI benefit  
24 for the child for the current maintenance of the child?  
25 We think not. Consistent with the very purpose of the

1 Social Security Act, is -- these monies are to ensure that  
2 that child gets a minimum income to pay for their current  
3 maintenance. The State shouldn't be treated any different  
4 here than a parent would be treated.

5 QUESTION: General Gregoire, can I ask you about  
6 the person who started all this? As I understand it, the  
7 -- the grandmother that the State was trying to displace  
8 as representative payee refused to pay anything for the  
9 child's current maintenance. She was putting it away in a  
10 kitty for the child's college education. And I suppose  
11 her theory was the State is going to pick up the tab  
12 anyway, so I think the best use for these Social Security  
13 benefits is to put them in a bank account so one day he  
14 can go to college.

15 Is -- and I understand there were two attempts  
16 to replace her because she was not spending the money on  
17 current maintenance.

18 When the -- when the social service agency is  
19 not the representative payee but a relative who doesn't  
20 have custody is, is there any means of getting those  
21 Social Security benefits used for the current maintenance?

22 MS. GREGOIRE: Not by legal process, Justice  
23 Ginsburg, which was a lesson learned by the grandmother,  
24 Wanda Pierce, in this case. The department wrongfully  
25 attempted to get at the Social Security benefits by legal

1 process. That's why there is no appeal of the specific  
2 Danny Keffeler case.

3 QUESTION: Why is it wrong? I mean, this money  
4 is there to pay for the child's care and maintenance. If  
5 the grandmother won't pay it, why couldn't the State go to  
6 HHS and say, appoint us?

7 MS. GREGOIRE: Well, you --

8 QUESTION: Why wouldn't they do it?

9 MS. GREGOIRE: You could. The issue is a 405(j)  
10 issue. The issue is whether that person should be paying  
11 for the current maintenance of the child.

12 QUESTION: Why shouldn't they?

13 MS. GREGOIRE: They should. But what happened  
14 in this particular case is Washington State has a specific  
15 statutory provision that says if the child has a guardian,  
16 the State cannot go in there and then ask to be  
17 representative payee. So there's a violation of State  
18 law.

19 QUESTION: Oh, I see. So there's a particular  
20 -- a particular State law --

21 MS. GREGOIRE: Correct.

22 QUESTION: -- that stopped that.

23 MS. GREGOIRE: Correct.

24 QUESTION: Okay. So --

25 QUESTION: Is that the basis on which the ALJ

1 ruled? I thought that was within the Social Security  
2 structure.

3 MS. GREGOIRE: The ALJ in the case of Danny  
4 Keffeler said that there was no finding that she had  
5 wrongfully used the benefits, but went on to suggest at  
6 the end that the State hadn't done anything like submit a  
7 bill to her showing an expectation that she was  
8 responsible to provide for the benefit and care of this  
9 child.

10 QUESTION: But that wasn't under State law, was  
11 it? That was -- that was a Federal --

12 MS. GREGOIRE: That's correct, Justice Ginsburg.  
13 The point being --

14 QUESTION: Then that's what creates the problem  
15 because if you have a State law and the grandmother just  
16 says, no, I'm not going to pay this money, which I would  
17 have thought was earmarked for that purpose, pretty much,  
18 and they won't do it, and then you say, okay, appoint us,  
19 and the State says, no, we -- we cannot appoint ourselves,  
20 and then you say to the grandmother, well, pay us, well,  
21 then you really are a creditor in respect to that.

22 MS. GREGOIRE: Well -- and specifically what  
23 happened in the case of Danny Keffeler, when the State  
24 attempted legal process against Wanda Pierce, that was  
25 wrong. That was a violation of 407(a) --

1                   QUESTION: And you're in an anomalous situation,  
2 aren't you? I mean, here -- here you have -- if you -- if  
3 you -- you're a creditor in respect to the grandmother who  
4 won't pay. I -- I don't quite see how to work it out.  
5 There's going to be an anomaly no matter what you do.  
6 You're a creditor in respect to the grandmother, so you  
7 can't force the parents to pay. And you can't go and ask  
8 HHS to appoint you because of the State law. And then  
9 there you are in those instances where you did manage to  
10 get yourself appointed, and you're now trying to reach a  
11 different result than would be there in the other cases.

12                   MS. GREGOIRE: But Justice Breyer, the remedy is  
13 the State could go to the Social Security Administration  
14 and ask them to consider an alternative representative  
15 payee for the child in this case because Wanda Pierce was  
16 not providing for the current maintenance of the child as  
17 we believe she should.

18                   We believe --

19                   QUESTION: And she might have if she had to care  
20 for the child. If she -- if the representative payee --  
21 if the child is in the custody of the representative  
22 payee, then the representative payee has to pay for the  
23 child.

24                   MS. GREGOIRE: Under State law, we believe the  
25 representative payee should pay for the current

1 maintenance of the child whether in the custody of that  
2 individual or not. The remedy, however, is not by legal  
3 process 407(a), but the remedy is 405(j) process by going  
4 to the Social Security Administration and asking --

5 QUESTION: Which gives it -- there's no role for  
6 the State court in that.

7 MS. GREGOIRE: Correct.

8 QUESTION: In that 405(j) process. It's all  
9 Federal.

10 MS. GREGOIRE: That's correct.

11 And with that --

12 QUESTION: And under 405(j), when you go to the  
13 Social Security Administration, its options are what?

14 MS. GREGOIRE: To remove that individual as a  
15 representative payee and appoint another.

16 QUESTION: Put you in.

17 MS. GREGOIRE: If -- unless we have a State law,  
18 as I indicated in the specific case of Danny Keffeler,  
19 would not allow us because she was named guardian. That's  
20 correct, Your Honor.

21 With that, I would like to reserve my remaining  
22 time for rebuttal.

23 QUESTION: Very well. Thank you.

24 MS. Millett.

25 ORAL ARGUMENT OF PATRICIA A. MILLETT



1                   ON BEHALF OF THE UNITED STATES  
2                   AS AMICUS CURIAE, SUPPORTING THE PETITIONERS  
3                   MS. MILLETT: Justice Stevens, and may it please  
4 the Court:

5                   There is no question that the use of Social  
6 Security benefits to pay for current maintenance needs by  
7 a beneficiary or by a parent as representative payee is  
8 permitted under the Social Security Act. There is no  
9 reason that the identical use of funds would suddenly  
10 become a prohibited alienation of Social Security benefits  
11 just because it's done by a State as representative payee.  
12 The anti-alienation provision of the Social Security Act  
13 prohibits the use of judicial processes or similar  
14 coercive processes to divert funds away from meeting the  
15 needs of a beneficiary. But there's nothing in the text  
16 or the purpose of the anti-alienation provision that  
17 supports the Washington Supreme Court's conclusion that it  
18 prohibits particular types of payments and expenditures of  
19 funds that the representative payee provision of the  
20 statute specifically permits.

21                  And that is because -- it's very important to  
22 understand that when a State serves as a representative  
23 payee, it does not receive funds, and it does not spend  
24 funds as an interposing claimant or creditor. Instead,  
25 under the Social Security program, it steps into the shoes

1 of the beneficiary. It cannot act unilaterally. It has  
2 to be appointed by the commissioner and, once appointed,  
3 must act pursuant to the commissioner's direction,  
4 supervision, and control.

5 QUESTION: Is -- is the issue of whether there  
6 was compliance with section 405(j) properly before us, do  
7 you think?

8 MS. MILLETT: No, it is not, Justice O'Connor.  
9 The question presented is limited to the violation of the  
10 anti-alienation provision 407(a). The complaint in this  
11 case is limited to 407(a). If you look at the joint  
12 appendix, page 118, specifically the -- the claim for  
13 relief, the aforesaid actions violate 42 U.S.C. 407, no  
14 allegation of violating 405. And there would be no basis,  
15 I don't think, for the class action. The class action  
16 allegations were based on this general rule of the 407  
17 violation. If there's particular allegations of misuse in  
18 particular cases for particular children, that would be a  
19 misuse claim. It should first be brought to the Social  
20 Security Administration.

21 QUESTION: Do -- do beneficiaries of SSI funds  
22 have a Federal right that they can enforce through a  
23 section 1983 action to have the representative payee act  
24 in their best interests?

25 MS. MILLETT: What they would do is bring --

1 bring a complaint. If you're -- if you're a beneficiary  
2 and you're dissatisfied with the way your payee is  
3 spending your money --

4 QUESTION: Right.

5 MS. MILLETT: -- then you can bring a complaint  
6 with the Social Security --

7 QUESTION: Would there be alternatively some  
8 lawsuit open --

9 MS. MILLETT: They -- I think --

10 QUESTION: -- under 1983?

11 MS. MILLETT: I'm not sure whether under 1983,  
12 but you could bring certainly a State law conversion out  
13 -- suit against someone if you thought that they were  
14 misapplying your funds. And -- and I assume you're  
15 talking about 1983 because we're talking about the State  
16 as --

17 QUESTION: Right.

18 MS. MILLETT: -- payee, but the vast majority of  
19 representative payees are private individuals.

20 QUESTION: Does -- does the State have any set-  
21 off rights that private entities don't? Suppose a private  
22 person were the representative payee. Do they have the  
23 same sort of set-off rights for other debts as the State  
24 does?

25 MS. MILLETT: Neither -- make sure I understand

1 what you're talking about by set-off. But neither private  
2 nor State officials would have the right to set off money  
3 against -- on -- on their own unilaterally to --

4 QUESTION: Well, I'm just talking about 407 now.  
5 I'm just talking about 407. Because the attorney general  
6 indicated that the State could, so far as 407 is  
7 concerned, set off a tax debt.

8 MS. MILLETT: I didn't understand that to be her  
9 -- her response. But if -- but, first of all, you have to  
10 ask how you come into possession. To undertake an offset,  
11 you somehow have to be in possession of the Social  
12 Security check, and the State and private people would not  
13 come into possession of that check unless they're  
14 appointed as a representative payee.

15 QUESTION: I'm assuming there -- my -- my  
16 question is whether -- what I'm trying to explore is  
17 whether the State has some special advantages that other  
18 representative payees might not in the area of being -- of  
19 being allowed to make certain set-offs to take certain  
20 funds. Because if that's so, then it sounds more like  
21 legal process. That was the --

22 MS. MILLETT: I'm sorry. I misunderstood your  
23 question. I didn't know that they had been appointed  
24 representative payee.

25 Once you are a representative payee, the State

1 and a private payee are in the same position in that when  
2 it comes to reimbursing yourself for past debts, as  
3 opposed to meeting current maintenance needs, the -- you  
4 -- you are subject to the Social Security Administration's  
5 rules. They have specific POMS and regulations on payment  
6 of past debts and --

7 QUESTION: In other words, the State of  
8 Washington is not relying here on any special statutory  
9 authority for set-offs that's applicable only to a State.

10 MS. MILLETT: No, it is not.

11 What's important to understand here -- and I  
12 think one of the premises for respondents' position is  
13 some confusion about the difference between current  
14 maintenance and past debts. Past debts are defined both  
15 in a POMS, the -- the interpretive manual done by the  
16 Social Security Administration, but also in the  
17 regulations on page 216 of the petition appendix,  
18 402.2040(d), when it talks about claims of creditors to be  
19 paid by a representative payee. It -- the limitation is  
20 on claims that arise prior to the first month for which  
21 you become entitled to benefits. That's what a past debt  
22 is. It would be reimbursed by a payee.

23 Any debts that arise after you start receiving  
24 benefits are current maintenance costs. So if I get a  
25 benefit check for January but for administrative reasons

1 the State does not pay my bills for that month until  
2 March, that's not a reimbursement. That is payment of  
3 current maintenance by the January check for January  
4 costs.

5 QUESTION: May I -- may I ask you a question  
6 about mechanics here? Just the facts are a little hard  
7 for me to understand at times. As I understand it, many  
8 of these children are in foster homes and the foster  
9 parents are paid by the State. Is the State agency that  
10 pays the foster parents the same agency that receives the  
11 Federal check?

12 MS. MILLETT: Yes, it is. There are two  
13 different units within -- it's the department -- in  
14 Washington, it's the Department of Social and Human  
15 Services that --

16 QUESTION: And the second question I had --  
17 there's a lot of discussion in the briefs about something  
18 called sweeping, which I don't understand. Would you tell  
19 me what it is?

20 MS. MILLETT: Well, I'm afraid it may have  
21 different meanings depending on whom you ask the question  
22 to. But as -- as it's discussed by the Court here, the --  
23 our understanding is that it -- it is this confusion about  
24 reimbursement and current maintenance. What Washington  
25 was doing was it would get a check in May that would be a

1 lump sum payment for February, March, April, and May. And  
2 it would go back and apply February's -- the -- the  
3 percentage of that lump sum check that was for February to  
4 the February expenses, March to the March expenses. That  
5 is the account sweeping that's talked about in the Court  
6 here and that's all that the record talks about.

7 That is not impermissible. That is, under our  
8 view, the use of -- use of this -- proper use of these  
9 benefits for current maintenance. The fact that for  
10 accounting reasons it happens 4 months later doesn't  
11 change anything.

12 Now --

13 QUESTION: What if it happens --

14 QUESTION: What if it happens 7 months --

15 QUESTION: -- even 6 months later?

16 QUESTION: -- 7 months --

17 QUESTION: Yes. Is there a 6-month cutoff on  
18 that?

19 MS. MILLETT: With respect to the SSI, the Title  
20 XVI benefits, there is -- there was after October 1996,  
21 and that's why there's some confusion because this case  
22 spanned that bridge. But as of October --

23 QUESTION: It's a little complicated, doesn't  
24 it?

25 MS. MILLETT: There's a lot of complicated

1 things here.

2 But the -- but -- but for that reason, the fact  
3 the commissioner has been administering this program and  
4 the representative payee's program since it started in  
5 1939 and it has recognized and endorsed the practice of  
6 all 50 States having foster care agencies doing this as  
7 not violating the anti-alienation provision is, I think,  
8 very important to keep in mind and that adopting the  
9 definition of anti-alienation provision, using that to  
10 police allegations of misuse under the representative  
11 payee system would be very confounding and confusing to  
12 the system.

13 QUESTION: May I ask you one question I asked  
14 the attorney general too? Do you also disagree with the  
15 analysis in the dissenting opinion?

16 MS. MILLETT: Yes, for -- for two reasons.

17 QUESTION: The same reasons she gave.

18 MS. MILLETT: Well, yes, I think it has again  
19 the confusion about past reimbursements which could still  
20 be for current maintenance and the payment of past debts.

21 But the other thing that the Washington Supreme  
22 Court's concurring dissenting opinion did was it said you  
23 could -- you could pay for maintenance, but first you have  
24 to pay for special needs. That gets it exactly upside  
25 down.



1           The -- there's much concern here about the best  
2 interest -- the best interest test here, but the best  
3 interest is a regulatory test designed to implement the  
4 purpose of these benefits. And the purpose of these  
5 benefits in the case of Danny Keffeler, Title II benefits,  
6 is just to replace the income stream of the lost parent.  
7 That parent is legally obliged to pay child support to the  
8 State of Washington. All Washington is doing is what his  
9 mother would have been legally obligated to do under --  
10 under State law with that same income. So it's consistent  
11 with the purpose of these benefits to use them for what  
12 they're doing. The SSI benefits are minimum income,  
13 establish a minimum floor. All that Washington has said  
14 is when the Federal Government --

15           QUESTION: But, of course, there's -- there's a  
16 statutory restriction on what the -- when the money comes  
17 from the Federal Government that does not apply when the  
18 money comes from the family.

19           MS. MILLETT: On?

20           QUESTION: 407.

21           MS. MILLETT: That's right. But it's important  
22 -- it's important to understand the limited role of 407.  
23 It said you can't come get these benefits, but it doesn't  
24 mean that -- that debts and obligations to pay can't arise  
25 and that you can't enforce, against the parents who may

1 have other income, child support through other mechanisms.  
2 You just can't come after, through a legal process, the  
3 Social Security benefits.

4 Thank you, Justice Stevens.

5 QUESTION: Thank you very much.

6 Ms. Roseborough.

7 ORAL ARGUMENT OF TERESA W. ROSEBOROUGH

8 ON BEHALF OF THE RESPONDENTS

9 MS. ROSEBOROUGH: Justice Stevens, and may it  
10 please the Court:

11 I think the Court's questions have hit on the  
12 key issues here, and I'd like to point out what I believe  
13 to be the errors in the State of Washington and the United  
14 States' analysis in this case.

15 I agree with Ms. Millett that the Social  
16 Security benefits that the State receives as  
17 representative payee on behalf of these children indeed  
18 belong to the children. And in its role as representative  
19 payee, the State essentially steps into their shoes to use  
20 the benefits to serve their best interests.

21 The regulation-mandated transfer from a State  
22 trust fund account, which is the account in which the  
23 State deposits the children's funds when they are  
24 received, to the State treasury occurs in the State of  
25 Washington because of the operation of the State statute

1 and two regulations, one superseding the other, that  
2 mandate that the State shall use those benefits to  
3 reimburse its previously advanced costs of care.

4           There's a singular exception in the regulations  
5 that permits a State to advance costs of care to a Social  
6 Security disability recipient and then later seek  
7 reimbursement out of the paid disability benefits for that  
8 care, and that is found at 42 U.S.C., section 1383(g)(1).  
9 That provision specifically provides an exception to the  
10 operation of section 407(a), and provides that where  
11 appropriate agreements are in place between the State and  
12 the commissioner of Social Security and between the State  
13 and the individual, that a State may advance costs of care  
14 in the period between the application for benefits and the  
15 date on which benefits are received and then seek  
16 reimbursement out of the Social Security funds for that  
17 period of interim assistance.

18           Apart from that exception, the use of Social  
19 Security benefits to reimburse previously advanced costs  
20 of care or public assistance is the payment of a debt  
21 within the meaning of the Social Security regulations.

22           QUESTION: Ms. Roseborough, I want to make sure  
23 that I understand what you're saying because it seems to  
24 me you're telling us the Social -- the food and shelter  
25 and clothing must be provided to the child today and

1 tomorrow and the next day. So the State is paying for  
2 that immediately, directly. The Social Security check for  
3 that month comes in a little later. It comes in a month  
4 later. If I understand what you're saying correctly, when  
5 the State takes the check which it gets in March for  
6 services rendered in January, it cannot use the -- that  
7 check to pay itself back for services it rendered in -- in  
8 January. Is that what you're saying?

9 MS. ROSEBOROUGH: Yes, Your Honor. It cannot  
10 use that check to pay itself back for services rendered in  
11 March or January without complying with the Social  
12 Security rules and regulations applicable to the authority  
13 to pay a debt.

14 QUESTION: Why isn't the same thing true of the  
15 guardian who's been appointed the -- the designated  
16 beneficiary? When a guardian gets money, the -- the  
17 guardian reimburses himself for past expenses. Is that  
18 also the payment of a past debt?

19 MS. ROSEBOROUGH: It absolutely would be the  
20 payment of a debt -- past debt, and it would be subject to  
21 the same restrictions.

22 QUESTION: Why isn't the same thing when you  
23 have an EZ pass if you go through the tolls? One of the  
24 kids buys an EZ pass and unfortunately it shows up on his  
25 credit card a month later.

1 MS. ROSEBOROUGH: Then the representative payee,  
2 having in its possession funds belonging to that child,  
3 makes a determination whether or not that is a debt that  
4 should be paid in the best interest of the child or not.

5 QUESTION: But if they had to put up a deposit,  
6 for example, the State couldn't pay for the EZ pass.

7 MS. ROSEBOROUGH: The State could pay for it if  
8 they had, in their possession, Social Security benefits  
9 that made that an appropriate expenditure of the funds.

10 QUESTION: In their possession. And let's skip  
11 EZ pass and go back to a parent who has custody of her  
12 child.

13 (Laughter.)

14 QUESTION: A parent has custody of her child.  
15 She pays for that child's food, clothing, and shelter in  
16 January. She gets the check from Social Security in  
17 March. So you're telling me that she cannot use that  
18 March check to reimburse herself for money that she spent  
19 in January.

20 MS. ROSEBOROUGH: Whether or not the parent  
21 could use this child's Social Security benefit check to  
22 pay herself for having advanced care to the child in  
23 January is wholly dependent on whether or not that  
24 reimbursement would be in the best interest of the child  
25 at the time the benefits are received.

1                   Ms. Gregoire and the Government misunderstand  
2 the regulations. They cite to 2040 --

3                   QUESTION: No. I just would like to know if --  
4 if -- as I see it, the State agency is identically  
5 situated with the parent. They're both providing food,  
6 clothing, and shelter now, and they will get the Federal  
7 check for that food, clothing, and shelter 2 months later,  
8 at least a month later. And if you're saying that then it  
9 -- they both -- the parent, the social agency -- they are  
10 debtors -- creditors. They're both creditors because they  
11 provided the service already?

12                  MS. ROSEBOROUGH: If they -- if they are using  
13 the -- the obligation under the Social Security laws is  
14 not to use the month's benefits --

15                  QUESTION: So the mother gets the check.

16                  MS. ROSEBOROUGH: -- in the -- for the month for  
17 which they are paid.

18                  QUESTION: The mother gets the check in March.

19                  MS. ROSEBOROUGH: Then she must --

20                  QUESTION: And she cannot use that for services  
21 that she has or food, clothing and shelter she has bought  
22 for the child in January.

23                  MS. ROSEBOROUGH: She has to make a  
24 determination in March at the time she receives the  
25 benefits as to what expenditure of benefits is in the best

1 interest of the child. Let's say in the interim between  
2 the use of the funds in January to -- to pay for whatever  
3 items were paid for in January, the child has suffered  
4 some event in February or March that requires the  
5 expenditure of those benefits or the child needs a  
6 communication device or a prothesis --

7 QUESTION: Or that -- or that she wants the  
8 child to go to university. Why -- why would it not always  
9 be in the best of the interest of the child not to pay  
10 back his parents and put it into a -- a trust account for  
11 future education? It would always be in the -- in the  
12 better interest of the child than paying off the past debt  
13 to the parent.

14 MS. ROSEBOROUGH: And that's why the Social  
15 Security regulations impose stringent guidelines on  
16 representative payees that want to use benefits to pay  
17 back for things that happened in the past.

18 QUESTION: No, but your theory, it seems to me,  
19 is there's a choice here, when you apply the best interest  
20 test, between a child with a full stomach and no trust  
21 fund and a child with a full stomach and a trust fund.  
22 And you're saying the trust fund always wins. The parent  
23 cannot pay back because it's always in the child's best  
24 interest to have the trust fund as well as the full  
25 stomach. Isn't that what you're saying?

1 MS. ROSEBOROUGH: Not necessarily. In fact, the  
2 Social Security regulations point out that in the case of  
3 a -- of a family unit, that is dependent on the Social  
4 Security benefits of the children in that unit, that they  
5 -- those benefits can be used to promote the stability of  
6 the family. And it may be -- well be --

7 QUESTION: I don't know -- I'm not quite sure  
8 how stability works into this, but let's -- let's forget  
9 the exceptional case for the moment. Save for that  
10 exceptional case, aren't you saying full stomach plus  
11 trust fund always wins under the best interest test?

12 MS. ROSEBOROUGH: If the child has a full  
13 stomach and if the --

14 QUESTION: Right. That's the -- that's the  
15 hypothesis: stomach is full, will be full, trust fund or  
16 not. Best interest says, put the money in the trust fund.  
17 Isn't that your position?

18 MS. ROSEBOROUGH: Absolutely true.

19 QUESTION: Does it bother you that the Social --

20 QUESTION: How would you square that --

21 QUESTION: Go ahead.

22 QUESTION: -- know how you square that position  
23 with a statute that seems aimed at giving children this  
24 money so they can pay for room and board and meet their  
25 basic subsistence.



1 MS. ROSEBOROUGH: The question is when do you  
2 apply the test of current maintenance and using the  
3 benefits at the time they are received to provide directly  
4 for the care of the child which is the obligation under  
5 the Social Security regulations, and when are the  
6 regulations with respect to the payment of past debts  
7 invoked.

8 Now, Ms. Gregoire argues -- excuse me -- General  
9 Gregoire argues that it's not invoked for 6 months, and  
10 she is relying on the provisions of the code related to  
11 certain lump sum benefits that provide additional  
12 protection to those benefits. Solicitor Millett says the  
13 same thing relying on section 24(d). But they are  
14 mistaken that -- one illustration of their mistake is  
15 found in the Social Security Administration's audit of  
16 Contra County, California, where the OIG found that that  
17 county was using Social Security benefits to reimburse  
18 itself for care provided before the benefits were actually  
19 received --

20 QUESTION: You've lost me a long time ago  
21 because I have a sort of basic question. It seems to me  
22 if a mother or somebody in the family who is the recipient  
23 of this extra money coming in from the SSI can use it, has  
24 the right to use it to pay a bill that the child ran up  
25 for some food or from shelter or, for that matter, EZ pass

1 or tuition -- and I -- I gather they have at least the  
2 right to do that if they want to pay those bills.

3 MS. ROSEBOROUGH: Not if they want to. They  
4 have the right --

5 QUESTION: They think it's the right thing to  
6 do, and so they -- yes, they think it's --

7 MS. ROSEBOROUGH: They think it's in the best  
8 interest of the child.

9 QUESTION: Well, all right. Let's -- let's  
10 imagine that doing what you think is right for the child  
11 is in the child's best interest. And therefore you do the  
12 right thing which is to pay the bills for food, shelter,  
13 tuition, and whatever that the child ran up. Now,  
14 assuming that that's okay, why can't the State do exactly  
15 the same thing?

16 MS. ROSEBOROUGH: The State can do exactly the  
17 same thing as long as it applies the same test. As long  
18 as it looks at whether or not the use of the benefits to  
19 reimburse the debt is the --

20 QUESTION: Okay. Now I got your point.

21 MS. ROSEBOROUGH: -- that is the best interest  
22 of the child.

23 QUESTION: Your point is neither the one nor the  
24 other can pay -- has the right under the statute or under  
25 the -- to pay these past debts for food, for example.

1                   And now my question would be they're the agency.  
2   They know what Congress had in mind. A naive reading  
3   would say Congress had in mind pay these bills for food  
4   and shelter, but they know it. They're the experts. They  
5   know their own regs, and they come in and tell you your  
6   reading of this is totally wrong. Of course, Congress  
7   wanted guardians, whether they're States or not States, to  
8   pay bills for food and shelter for this child who has no  
9   parents. All right. Now, they say, of course, they  
10   wanted that. There's nothing in the statute that says  
11   clearly to the contrary. So they win. Now, what's your  
12   response?

13                  MS. ROSEBOROUGH: One, the Social Security  
14   Administration has consistently, prior to its pleadings in  
15   this case at least, made the exact same demarcation that  
16   we are arguing here. The Social Security Administration  
17   has said that once a benefit payment is received, you look  
18   backwards at every debt that occurred prior to that date  
19   and judge whether or not that debt can be paid on the  
20   basis of whether or not the current and foreseeable needs  
21   of the beneficiary have been met and whether or not it's  
22   in the best interest of the beneficiary to pay that debt.  
23   As to going forward --

24                  QUESTION: Well, doesn't -- doesn't the statute  
25   basically leave it to the commissioner to -- to evaluate

1 whether a representative payee is acting in the best  
2 interest of the child?

3 MS. ROSEBOROUGH: It does ask the --

4 QUESTION: And we have a representative of that  
5 commissioner here before us today saying that under the  
6 statutory and regulatory scheme, that payments such as  
7 these for foster care are in the best interests of the  
8 child. Why should we strain to find otherwise --

9 MS. ROSEBOROUGH: Because the --

10 QUESTION: -- and -- and upset what's going on  
11 all across the country? I think your position is  
12 troubling for that reason.

13 MS. ROSEBOROUGH: If I may first respond that  
14 factually it's not true that this is what's going on  
15 throughout the country. The facts of the various cases  
16 that we know about, through cases that have occurred in  
17 the various States, illustrate that they take very  
18 different or use very different procedures with respect to  
19 the funds. And we only know of Washington that has a  
20 process that compels the State administrator to ignore  
21 their obligation to evaluate the best interests of the  
22 child at the time the benefit is received and instead make  
23 a determination that all of the benefits should be used to  
24 pay past debts to reimburse public assistance that was  
25 expended without regard to the eligibility of the child

1 for Social Security benefits.

2 QUESTION: Well, the representative can be --  
3 the representative can be removed if the representative is  
4 misappropriating funds or misusing the representative's  
5 position at responsibility. But that has nothing to do  
6 with -- with the legal process provisions of 407.

7 MS. ROSEBOROUGH: It has to do with that in this  
8 sense. The State argues that section 407(a) doesn't apply  
9 to it because it is acting properly as a representative  
10 payee. We contend -- and I think we demonstrate in our  
11 brief, and the State supreme court in fact held -- that  
12 Washington was not acting as a properly regulated  
13 representative payee within the meaning of section 405(j).

14 QUESTION: But that we're -- we're told by the  
15 Government is none of the State court's business. I asked  
16 that question expressly to find out whether in the  
17 Government's view 405 is something that any State court  
18 could enforce, and the answer was no. 405 is for -- if --  
19 if you think the representative payee is not acting  
20 properly, you go complain to the Social Security  
21 Administration, and it's entirely a Federal law, not any  
22 State court that interferes with the representative  
23 payee's control.

24 MS. ROSEBOROUGH: I -- I believe that her  
25 response was that you could bring a State law action, for

1 example, for conversion against the representative payee  
2 that failed to administer benefits in accordance with the  
3 Social Security Act. Those Social Security regulations  
4 themselves provide that you cannot sue the administration  
5 for a representative payee's failure to use the benefits  
6 properly, but that you may be able to sue the  
7 representative payee themselves.

8 QUESTION: But -- but your answer to my 407  
9 question talked about 405. I don't -- I don't understand  
10 that.

11 MS. ROSEBOROUGH: 407(a) clearly prevents a  
12 State from using legal process like the administrative  
13 regulations here to collect for past expenditures.

14 QUESTION: Okay. Why -- why is this -- why is  
15 this legal process?

16 MS. ROSEBOROUGH: It's legal process --

17 QUESTION: Why is it -- why is it something that  
18 any representative payee, whether they're a State entity  
19 or not, could not do?

20 MS. ROSEBOROUGH: Because Washington is not  
21 making an evaluation that the payment of the debt to  
22 itself is in the best interest of the child. What it is  
23 doing is acting pursuant to the compulsion of a regulatory  
24 scheme that requires that the first use of the benefits be  
25 to reimburse itself. The Social Security regulations do

1 not state that the use of the benefits to pay current  
2 maintenance --

3 QUESTION: But that's an odd term of the use  
4 legal process, unless you're saying any set-off is legal  
5 process.

6 MS. ROSEBOROUGH: A set-off --

7 QUESTION: Suppose a private entity just sets  
8 off an earlier debt against current funds. That's --  
9 that's not legal process in the ordinary sense of the  
10 term. It's a set-off.

11 MS. ROSEBOROUGH: That would be depending on  
12 whether they were doing so by operational law or because  
13 of their own volition. Here the State is clearly acting  
14 under what it contended below at least was the volition or  
15 the -- the obligation of law. It was saying that the law  
16 gave it the right to secure or require the use of these  
17 Social Security benefits to pay a specific obligation,  
18 that specific obligation being the debt to the State that  
19 arose when the State advanced funds for the child's care.

20 QUESTION: Well, you're saying that anytime the  
21 law provides for action or provides that action will be  
22 lawful, that taking that action involves resort to legal  
23 process. Is that your definition?

24 MS. ROSEBOROUGH: I'm saying that anytime the  
25 law allows or permits the securing of Social Security

1 benefits to the payment of a specific obligation, that  
2 that is legal process or the application of legal process  
3 to those benefits in violation of section 407(a).

4 QUESTION: But the reasonable word in there I  
5 think is securing. All the State is doing is taking from  
6 this account and putting into that account. And -- and I  
7 think all the State is doing is saying, under the law,  
8 we're able to do that. The law says we can do that, or at  
9 least it doesn't say we can't. And I think you're saying  
10 that whenever the State claims legal authority, it is  
11 using legal process within this statute. Is -- is that --  
12 isn't that your position?

13 MS. ROSEBOROUGH: No. My position is that --

14 QUESTION: Then I still haven't gotten it.

15 MS. ROSEBOROUGH: -- that when the State here  
16 acts to transfer the benefits from the trust fund to the  
17 State treasury coffers, it does so by presenting a bill,  
18 in essence, a statement of account or a statement of  
19 expenditures, to the trust fund unit reflecting the past  
20 expenditures of the State on behalf of that child.  
21 Essentially it's saying, I have advanced monies for the  
22 care of this child and I now want to be paid back out of  
23 the child's trust fund unit. Fair enough. But the  
24 obligation of the State, wearing its hat as representative  
25 payee of the child, is to make a determination at that



1 point whether that repayment would be in the best interest  
2 of the child.

3 QUESTION: Yes, but you have to go -- go on and  
4 say what that -- why that's legal process. If the  
5 grandmother does it, you would also have to say it is  
6 legal process under your view because it's authorized by  
7 the common law, I suppose, of the State or maybe by a  
8 statutory law. Suppose you have a statute that says a  
9 creditor can set off against an earlier debt money that  
10 the creditor receives. That's not legal process in any --  
11 in any usual sense of the term

12 MS. ROSEBOROUGH: Absolutely it would be, the  
13 latter thing that you said, that if a State allowed -- if  
14 a State statute allowed a set-off against a Social  
15 Security benefit to pay a past debt, that would be a  
16 violation of section 407(a). In fact, Federal law  
17 provides that even if the United States itself seeks to  
18 set off a debt like past due taxes against Social Security  
19 benefits, that it has to have a specifically set out in  
20 the statutes exception to section 407(a), and that in fact  
21 is what exists. There's a statute that says by express  
22 reference to section 407(a) as required by section 407(b)  
23 that the United States may set off past due taxes against  
24 Social Security benefits.

25 Absent that statutory authorization or exception

1 to section 407(a), a set-off compelled by law or  
2 authorized by law would be within the ambit of legal  
3 process or an application of legal process to benefits  
4 prohibited by section 407(a).

5 QUESTION: Would -- would you say the same thing  
6 if the State were simply funding the -- the cost of food  
7 and clothing for the current month and on -- on Wednesday  
8 it -- it paid a bill for groceries and on Thursday it  
9 presented this document that allowed the transfer from the  
10 trust fund to the -- to the State's account? That too  
11 would be legal process?

12 MS. ROSEBOROUGH: That -- if it was doing so --

13 QUESTION: So the only way the State could do it  
14 then, I take it on your theory, is to use the money to pay  
15 in advance of its own expenditure a -- a fund from which  
16 it then could draw under its separate hat to pay the  
17 groceries.

18 MS. ROSEBOROUGH: The presentation of the  
19 grocery bill to the representative payee for payment may  
20 -- and -- and the payment that comes as a result of that,  
21 may not -- may or may not be legal process depending on  
22 what it is that authorizes that transaction and whether or  
23 not --

24 QUESTION: Well, it -- it paid the grocery bill  
25 on Wednesday, and Thursday it says, we're going to

1 transfer the money to pay the grocery bill. That's  
2 process on -- on your theory, isn't it?

3 MS. ROSEBOROUGH: No, not necessarily.

4 QUESTION: What's the difference between  
5 Wednesday and Thursday and February and March?

6 MS. ROSEBOROUGH: Under my theory, it's clearly  
7 a reimbursement. And as a reimbursement, it then falls  
8 under the regulations with respect to reimbursements.

9 QUESTION: Why isn't it a reimbursement between  
10 February and March?

11 MS. ROSEBOROUGH: It is absolutely a  
12 reimbursement. That's exactly what we claim

13 QUESTION: Then -- then if -- if there's legal  
14 process for the February/March transfer, there's legal  
15 process for the Wednesday/Thursday transfer.

16 MS. ROSEBOROUGH: It's the Wednesday/Thursday  
17 process in the hands of a private representative payee not  
18 acting under compulsion of law.

19 QUESTION: I'm -- I'm talking about the State.

20 MS. ROSEBOROUGH: There's two --

21 QUESTION: I'm talking about what we've got  
22 here.

23 MS. ROSEBOROUGH: Acting --

24 QUESTION: It's legal process when -- when we --  
25 when we buy the groceries Wednesday and we make the

1 transfer Thursday. Right?

2 MS. ROSEBOROUGH: Then -- but the State of

3 Washington is doing that because it is compelled by

4 statutes and regulations that mandate that it shall use

5 those benefits to reimburse the foster care costs. If it

6 was not operating -- if it was making a choice --

7 QUESTION: That's true --

8 MS. ROSEBOROUGH: -- on Thursday --

9 QUESTION: That's true in either instance, isn't

10 it?

11 MS. ROSEBOROUGH: Not --

12 QUESTION: I mean, that's -- that's a wash, as

13 between February and March and Wednesday and Thursday.

14 MS. ROSEBOROUGH: That is a wash.

15 QUESTION: Okay.

16 MS. ROSEBOROUGH: So the question is in both

17 instances on Thursday or a month later, is the use of

18 these benefits to pay for that which has been provided in

19 the past in the best interest of the child.

20 QUESTION: Okay. Then it's --

21 MS. ROSEBOROUGH: That --

22 QUESTION: -- then it's -- that's why I -- I

23 tried to lead to the conclusion -- let me try it again --

24 that the only way on your analysis to avoid the

25 implication of legal process would be to set aside funds

1 received from the Social Security Administration in  
2 advance for payment for future groceries. Is that  
3 correct?

4 MS. ROSEBOROUGH: That would be the only way to  
5 avoid a reimbursement scenario, would be to use the Social  
6 Security benefits first to pay for those things that the  
7 child needs. That would -- that would avoid the  
8 regulations respecting past debts and reimbursement.

9 QUESTION: So you would have no case if you take  
10 the Social Security check that you receive in February for  
11 January to cover the January period instead of reimbursing  
12 the State for what it supplied in January. It takes that  
13 check and puts in the account and says, now, this will  
14 cover the March food, clothing, and shelter. That would  
15 be all right, and you wouldn't have any 407 --

16 MS. ROSEBOROUGH: And that appears to be what  
17 many States do. For example, it appears from the brief --

18 QUESTION: Even though the check was supposed to  
19 be for January and not for April.

20 MS. ROSEBOROUGH: The check is -- the  
21 eligibility of the check, if it's an SSA check, is  
22 determined by the child survivorship through January. So  
23 that's why it's paid at the end of January. A disability  
24 check, however, is paid at the beginning of the month for  
25 which it is intended to be used.

1                   QUESTION: So what all this -- so what all this  
2 litigation will have achieved is just to compel the States  
3 to use the current checks that they get for next month  
4 instead of for last month. You -- you get maybe a 3-  
5 month ride. I mean, I guess they -- they lose 3 months'  
6 worth. But so long as they re-gear up their system so  
7 they're paying for next month, all of this will go away.

8                   MS. ROSEBOROUGH: They will avoid violation --  
9 avoid encroaching or violating section 407(a) --

10                  QUESTION: Does that make a lot of sense?

11                  MS. ROSEBOROUGH: It does make a lot of sense  
12 because the problems in Washington's administration with  
13 accounts, we think, with double dipping, with use of the  
14 benefits to pay administrative and programmatic costs  
15 instead of to pay for items, food, clothing, shelter, and  
16 special needs of the child, could not occur in a system  
17 where the Federal benefits were used in the first instance  
18 to pay for those things.

19                  Moreover, in Washington --

20                  QUESTION: But why -- why --

21                  MS. ROSEBOROUGH: -- the average payment to a  
22 disabled child is less than the guaranteed minimum under  
23 Federal law so that this child would at least be assured  
24 of the use of the full amount of the Federal benefit to  
25 which they are entitled without set-off by the State. The

1 State could add to it but it cannot, as Washington does,  
2 subtract from it.

3 QUESTION: Instead of --

4 QUESTION: Is it not true that -- that in the  
5 overwhelming number of cases, the Federal benefit is not  
6 nearly enough to cover the care of the child, that the --  
7 the average SSI payment doesn't make it to cover the  
8 monthly needs?

9 MS. ROSEBOROUGH: Nor does the payment that the  
10 State makes under its foster care program. In the -- in  
11 the case -- in the specific case of the State of  
12 Washington, the guaranteed minimum payment under Federal  
13 Social Security law to an SSI-eligible child averages \$715  
14 a month. The State of Washington pays the -- a stipend to  
15 the household of that child of some \$300 to \$400 a month  
16 depending on the age of the child. That means --

17 QUESTION: But now if we -- if we had the new  
18 system now where you take the January check and you pay  
19 for March or April with it, then the other things that  
20 you're complaining about, the double dipping, what you  
21 allege -- and they may say, no, it's not happening -- the  
22 proper forum to determine that would be the Social  
23 Security Administration. Wouldn't it be?

24 MS. ROSEBOROUGH: In this case, the claim was  
25 brought under State law against the State of Washington

1 for using the benefits in a way that was inconsistent with  
2 Social Security law. The State of Washington offered as  
3 -- by way of defense, that it was complying with section  
4 405(j) and that section 407(a) did not apply to it. But  
5 the State law claims for conversion and misuse of the  
6 benefits remain and are not dependent on -- they're  
7 dependent on establishing, as we have, that the State was  
8 misusing the benefits, but they're not dependent on the  
9 availability of a direct remedy under the Social Security  
10 rules.

11 Moreover, section --

12 QUESTION: There's one -- one question that I'd  
13 like you to ask because it's really troubling me more than  
14 anything else here. We have a brief from the Children's  
15 Defense Fund that says most of these children don't have a  
16 Wanda Pierce. They have no one but the State. They have  
17 no one to make out an application to Social Security  
18 Administration. Were not the State agency operating the  
19 way it is operating, there simply would be no benefits, no  
20 Social Security, no -- no SSI. There would be that much  
21 less available for the care of all these children in the  
22 system

23 MS. ROSEBOROUGH: This is exactly true that what  
24 the State of Washington is doing is using the Federal  
25 funds that are intended for the individual benefit of



1 disabled children and children who are SSA recipients to  
2 fund the general foster care system

3 QUESTION: I asked you to answer that question.  
4 Is -- what the Children's Defense Fund is saying is that  
5 because Washington is doing what it is doing -- and it is  
6 doing it because it's going to get -- it's going to get  
7 the Federal Government to pay, as these benefits were  
8 designed to pay, for the food, clothing, and shelter of  
9 the child -- that there would be no one to do this and  
10 there would be less money in the entire system And  
11 that's the question I asked you to answer, not another  
12 question.

13 MS. ROSEBOROUGH: We believe that States will  
14 continue to serve as representative payees even if they're  
15 compelled to administer the benefits in a way that is  
16 consistent with the Social Security rules.

17 QUESTION: What's the basis for that belief?

18 MS. ROSEBOROUGH: The basis for that belief is  
19 that the State receives enormous benefit from having  
20 available to itself the Federal benefits and being able to  
21 expend those benefits in the best interest of the child  
22 and to pay for those things that come within the defined  
23 needs of the disabled children. It has no reason to give  
24 up that money. And we don't ask it to. What we do ask it  
25 to do is to administer those funds properly under the

1 Social Security Act and to make a determination, before it  
2 uses those funds to fill the State treasury, whether or  
3 not or what use of the funds would be in the best interest  
4 of the child. That's exactly what the Social Security  
5 Administration has consistently required of representative  
6 payees.

7           In this case where a State had -- where a child  
8 has already received public assistance, which is in part  
9 State and in part federally funded, for a State to use  
10 another Federal benefit that the child receives to  
11 reimburse the expenditures not only of the State dollars  
12 but also of the Federal dollars that were provided to the  
13 State under that program for the use of the child is an  
14 abuse of the representative payee system. It is a -- and  
15 is a disservice to the disabled child.

16           Social Security disability benefits were  
17 intended to provide for the special needs of the disabled  
18 child, to assist them in the transition to adulthood, and  
19 to provide them some relief from the burdens of their  
20 disability. In the State's concept, as it would use those  
21 funds, without any heed to the best interests of the  
22 child, no dollar of Social Security benefits received by a  
23 disabled child before they reach their 18th birthday would  
24 be available to meet those special needs because the State  
25 of Washington refuses to acknowledge an obligation under

1 the Social Security laws to determine what expenditure is  
2 or is not in the best interest of the child.

3 2040(d) does not provide that a -- any payment  
4 of a benefit is current maintenance if -- as long as it  
5 was for food, clothing, or shelter. It makes a clear  
6 demarcation between -- and the example in the regulation  
7 makes clear -- between benefits that are used at the time  
8 they are received to provide for care and benefits that  
9 are sought to be used for care that was provided before  
10 that. We simply ask that the Court apply the generally  
11 applicable Social Security benefit regulations to the  
12 State of Washington's use of the funds for reimbursement.

13 If there are no further questions.

14 QUESTION: Thank you, Ms. Roseborough.

15 General Gregoire, you have 4 minutes.

16 REBUTTAL ARGUMENT OF CHRISTINE O. GREGOIRE

17 ON BEHALF OF THE PETITIONERS

18 MS. GREGOIRE: Where is the legal process in  
19 this case? There is in fact none. The only thing that's  
20 being suggested is reimbursement is the legal process. In  
21 the case of Title II benefits, an individual is eligible  
22 in January. Social Security doesn't pay until February.  
23 That has to be construed as reimbursement. Counsel's  
24 interpretation would then turn the entire program on its  
25 ear. The fact of the matter is that is not legal process.

1 It's what --

2 QUESTION: Your definition of legal process is a  
3 process that requires judicial involvement?

4 MS. GREGOIRE: Judicial, quasi-judicial. If an  
5 individual has the authority by law and -- who goes out  
6 and -- and actually implements something that takes the  
7 benefits, but it's more than reimbursement as we have --

8 QUESTION: Well, that's what your adversary has  
9 -- has stated, that this is pursuant to authority of the  
10 law. That's why it's legal process.

11 MS. GREGOIRE: We would submit, Justice Kennedy,  
12 if you look at Bennett and Philpott, what this Court found  
13 in both those cases was legal process was actual in the  
14 one case in implementation of a lawsuit; in the other  
15 case, the actual attachment.

16 We have nothing of that nature here. We have a  
17 simple -- in answer to your question about is the State  
18 asking for special rights, to the contrary. The State is  
19 simply asking not to be disadvantaged, to be treated no  
20 different than any other representative payee which was  
21 your holding in Philpott. So the fact of the matter is  
22 here we're simply asking to do that which any parent would  
23 do in fulfilling his or her responsibilities in caring for  
24 a child.

25 Let me also, if I can, turn to the -- the Social

1 Security reimbursement idea of -- of using it in the best  
2 interests of the child. What counsel has suggested is the  
3 only thing that's in the best interests of the child is  
4 extras. The State of Washington pays thousands of dollars  
5 for these children because they come with psychiatric  
6 kinds of needs. We are not paying the minimum. We are,  
7 in fact, paying significant amounts of money.

8 In the case of one of our randomly selected  
9 children, Nacole Blinka, in one month, over \$2,000.

10 In the case of another randomly selected child,  
11 Denita Smith, in one month, over \$3,000. And yes, we held  
12 the benefits, got no reimbursement whatsoever, to help  
13 Denita Smith be reunited with her parent so that her  
14 parent could set up a home, pay for the food and the  
15 clothing and shelter that was necessary for that child.

16 The fact of the matter is the State of  
17 Washington does exercise discretion which is accorded it,  
18 broad discretion in the best interests of the child. She  
19 would simply ask you only extras are in the best interest.  
20 We would submit supplying food, clothing, shelter is  
21 always in the best interests of the child and that is what  
22 Social Security suggests.

23 She indicates that her complaint suggests that  
24 there is some State law claims. To the contrary. The  
25 complaint all the way along has suggested a 407 violation.

1                   She further suggests that R.C.W. 74.13.060, the  
2 statute in question here, is mandatory. To the contrary,  
3 it is not. It allows the State discretion to use Social  
4 Security benefits for the special needs of a child and to  
5 reimburse the State which is precisely what occurs in this  
6 particular instance.

7                   I ask you to return to the question presented.  
8 Is there a violation of 407(a) in this case because a duly  
9 designated representative payee, supervised by the Social  
10 Security Administration, is using the monies for the  
11 current maintenance of the child. The plain reading of  
12 407(a) to that question is no.

13                  With that, we would ask you, respectfully, to  
14 reverse the decision of the Washington State Supreme  
15 Court. Thank you.

16                  JUSTICE STEVENS: Thank you, General Gregoire.

17                  The case is submitted.

18                  (Whereupon, at 12:02 p.m., the case in the  
19 above-entitled matter was submitted.)  
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